Proposal for a Digital Fairness Act risks adding unnecessary red tape

The European Commission has finally presented its proposal for a Digital Fairness Act (DFA), addressing several aspects of the design, service and terms under which businesses interact with consumers online. There is no doubt that the 450 million consumers in the Single Market deserve to be protected against unfair und manipulative online practices.

At the same time, businesses deserve clarity and not to be burdened with disproportionate or unnecessary red tape. The question is if the proposal for a DFA as it currently stands will be able to serve both purposes.

The DFA - a major update of the EU consumer protection rules – was presented together with a revision of the Consumer Protection Cooperation Regulation (CPC Regulation), giving the Commission stronger powers to directly investigate and issue fines. Part of the package is also a simplification directive with targeted amendments to the Consumer Rights Directive to simplify its application online.

The DFA will address several aspects of the design, service and terms under which businesses interact with consumers online.

According to the Commission, these initiatives will build on the existing digital rulebook to strengthen consumer protection, contribute to fairer online markets and create a level-playing field.

The DFA is not just a regulation for Big Tech but will affect any business that offers services and goods to consumers via the internet using commercial practices to influence consumers' transactional decisions.

The Confederation of Swedish Enterprise is concerned that the proposal for a DFA will lead to disproportionate and unnecessary red tape for businesses and would like to specifically highlight the following concerns.

Simplification and reducing burdens

The Commission has increased focus on regulatory simplification and reducing burdens on businesses to strengthen EU competitiveness. To this end, it has put forward omnibus proposals and other legislative initiatives with a significant simplification dimension. This was also the expectation and promises for the DFA. The DFA will amend the **Unfair Commercial Practice Directive** and convert it into a **regulation**. The conversion of the rules into a regulation may reduce legal uncertainty caused by differences in transposition and divergent national interpretation, but it is not a guarantee that regulatory burdens will be reduced for businesses. National adaptation for correct application will often still be necessary. Companies will also need to redesign interfaces, processes and documentation due to the measures included in the proposal for the DFA. Therefore, the proposed measures in the DFA together with the amendments in the Consumer Rights Directive do not meet the expectations towards the Commission

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and its simplification efforts.

Delegated acts

According to the DFA, the Commission can adopt **delegated acts** to amend the **blacklist on dark patterns** and to add or modify features regarding **addictive designs**. Having the ongoing discussion at EU level on misuse of delegated acts in mind, the power to amend the lists through delegated acts should be clearly defined and accompanied by impact assessments.

CPC Regulation and fines

The revision of the **CPC Regulation** is welcome and gives the Commission stronger powers to directly investigate. However, the Confederation of Swedish Enterprise is concerned about the Commission's proposed power to **impose fines up to 6% of a company's global annual turnover** in large-scale cases. **Turnover-based and especially global turnover-based fines** may result in disproportionate sanctions for individual companies, particularly where a breach concerns only a small part of their business. Any sanctions must be proportionate and reflect the nature, gravity and duration of the infringement. High potential fines require clear and predictable legal requirements, supported by practical guidance, and effective procedural safeguards.

Overlapping regulations

Given the risk of the Digital Fairness Act overlapping with the Digital Services Act, the Artificial Intelligence Act, the General Data Protection Regulation and other EU rules, businesses may struggle to navigate the EU digital rulebook. The DFA should therefore address clearly identified gaps rather than duplicate existing obligations. This will also require clear allocation of responsibilities and coordination between enforcement authorities to provide businesses with predictable requirements and avoid inconsistent requirements or enforcement and duplicative penalties for the same infringement.

Vulnerable consumers

The Confederation of Swedish Enterprise has earlier raised concerns against undermining the **concept of the average consumer** in the DFA and is now concerned with the DFA taking a new approach to consumer vulnerability. Instead of defining vulnerability linked to attributes like age or credulity, the proposal uses the term "personal circumstances", which opens for temporary and other broader factors making consumers especially vulnerable to unfair commercial practices.

Easing the burden of proof

The European Commission should act cautiously when introducing new rules around evidence and **easing the burden of proof**. According to the DFA, national courts and authorities can require traders to disclose evidence in relation to the design, operation and impact on consumers of the commercial practice when there is a reasonable suspicion of such an unfair commercial practice. Easing the burden of proof in this way could undermine the fundamental civil law principle that the party making a claim bears the burden of proving it. In the longer term, this could have unforeseen and unintended consequences in litigation trends and could prove disproportionate.

Finally, the Confederation of Swedish Enterprise sees a risk that the predominantly principle-based legal framework of the Unfair Commercial Practice Directive with the conversion into a DFA will shift towards more prescriptive rules. The DFA should be principle-based, and technology-neutral. This is important for ensuring predictability, encouraging innovation, and creating a positive investment and competitive climate.

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